Summer summary
5 September 2017
This summer’s top antitrust & competition stories

Happy September! Global antitrust enforcers showed little sign of taking the summer off, and competition law enforcement remains a high priority in many countries. Here’s a quick recap of the summer’s hottest headlines around the globe. We look forward to catching up with you this autumn.

The Linklaters Global Competition/Antitrust Group

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Read on for the full stories

Global

Politics, cross-border M&A and antitrust

What determines, or should determine, the outcome of antitrust reviews: law, policy or politics? The question is asked more and more
frequently, in particular as an adjunct to woes over economic globalization. Recently, politicians and industry representatives have voiced concerns in the context of acquisitions by Chinese state-owned companies, and based on protectionism and employment worries. Well-founded or not, an increasing number of countries are arming themselves to review transactions on more than competition and national security grounds.

For instance, there is bipartisan support for extending the remit of CFIUS, the US committee that conducts national security reviews of foreign investor M&A activity. CFIUS and the President already enjoy broad discretion under a process generally viewed as opaque and sometimes subject to political pressure. Even prior to any legislative proposal, review periods have been extended considerably; and technology transactions are given especially close scrutiny.

Moreover, persistent concerns are being voiced that political influence could impact US antitrust reviews of M&A deals. Today, well-prepared companies who perceive a risk of political interference in their transactions are engaging lobbyists, and preparing to trade in the currency of public opinion, investment and employment. On the other hand, despite a storm of public criticism regarding the online giant Amazon’s proposed acquisition of bricks and mortar organic grocery store Whole Foods, the FTC quickly cleared the deal, which closed at the end of August.

In Europe, foreign investment is scrutinised against national security at the level of the EU’s Member States. Germany recently beefed up its system. The UK, among others, has committed to protecting “critical infrastructure.” In addition, several Member States are pushing for the adoption of an EU-wide system for the control of foreign investment. Watch this space: more is certain to follow.

The European Commission, meanwhile, continues to stress the distinction between foreign investment and antitrust rules. Commissioner Vestager has repeatedly emphasised how the concept of fairness of opportunity and outcome plays an important role in EU competition policy. For example, she has expressed an inclination to intervene directly in markets where prices are perceived as excessive, albeit with caution and without harming innovation. Politics, policy, or law?

In China, too, a more conservative approach to merger reviews is discernible, suggesting increased political influence. This may not directly lead to higher intervention rates, but will at the very least mean a longer and more complex review process.

**Flout procedure, face fines**

Do merging parties deliberately ignore procedural rules of merger control? Do competition authorities deliberately zero in on, and prosecute, creative deal strategies? Dealmakers will do well to consider a series of recent investigations of alleged breaches of merger control procedures, especially in an environment where the successful navigation of multiple merger review systems depends on effective coordination among parties and agencies.

Quite prominently, several competition authorities have come down hard on the way in which Canon structured its acquisition of Toshiba Medical Systems Corporation (TMS). This case cast further doubt on the use of two-stage option structures in deals, given the standstill obligation which exists under most systems of merger control.

Although the Canon/TMS deal did not raise substantive competition concerns, China’s MOFCOM and Japan’s JFTC both condemned the deal structure as unlawful gun jumping. The European Commission initiated proceedings against the parties in July 2017 after it reached the same preliminary view. US agencies have long viewed warehousing arrangements as violations of the merger rules because they confer
“beneficial ownership” that they say undermines the incentive of the parties to compete aggressively. Click here for further details and analysis of the Canon case.

In addition to the Canon case, MOFCOM has continued its enforcement against failures to notify reportable transactions and early implementation. By July, it had already published nine penalty cases, compared to six in the prior year. A MOFCOM official has suggested that it might raise the penalties for non-compliance.

The US authorities have affirmed their focus on gun jumping. Earlier this year, the DOJ hit Duke Energy with a $600,000 civil penalty for gun jumping. After Duke agreed to purchase a power plant from Calpine Corp., but before it filed its HSR notification, the parties entered into a tolling agreement that enabled Duke to exercise immediate control over the plant and to accept the risk of potential gains and losses. The DOJ charged Duke Energy with obtaining beneficial ownership of the plant prematurely.

This recent run of cases forms part of an unprecedented surge in enforcement activity directed at alleged procedural violations of the merger control rules. Other cases include the €110 million fine on Facebook (see EU stories below) for providing misleading or incorrect information; proceedings opened against General Electric and Merck for similar failures; the €80 million fine imposed by the French Competition Authority on Altice for gun jumping and proceedings opened against the same company by the European Commission for alleged early implementation of its acquisition of PT Portugal. Dealmakers will need to be more careful than ever when seeking to implement interim arrangements preceding clearance and when providing information to the regulators.

“Excessive pricing” revival

Many will recognise the game show format of “the price is right.” The new game in town for many competition enforcers is to probe whether “the price is excessive” and therefore anticompetitive. Historically, agencies have been reluctant to take “excessive pricing” cases, but recent activity in the pharmaceutical sector may herald a shift in enforcement priorities.

For instance, in China, nine ministries (including the NDRC and the National Health and Family Planning Commission) in June rolled out a joint mechanism to cope with drug supply shortages and crack down on price gouging and monopolistic conduct. In parallel, the NDRC is drafting new guidelines on the pricing of medicines in short supply and active pharmaceutical ingredients. The guidelines aim to identify areas of risk and provide compliance guidance for suppliers.

Meanwhile, in the US, officials under pressure from Congress use price hikes as a red flag, and have opened investigations to see whether high prices indicate monopoly power, manipulation or price-fixing. In May 2017, officials raided generic pharmaceutical manufacturer Perrigo in connection with its ongoing investigation of generic drug pricing. Noting that a number of companies have been implicated, Perrigo publicly disclosed the raid, stating that “the Antitrust Division has been looking at industry-wide pricing practices.” The raid was just the latest indication of the US authorities’ aggressive enforcement in this area.

Beyond the wide-ranging DOJ investigation, dozens of state attorneys general have filed suit against generic pharmaceutical companies alleging price-fixing, market and customer allocations and other anticompetitive behaviour, resulting in increased prices for consumers.

In May 2017, the European Commission opened its first investigation into suspected excessive pricing in the pharmaceutical industry. In particular, the Commission is investigating whether Aspen Pharmacare has “imposed unfair and excessive prices in the form of significant price increases for medicinal products,” as well as allegations that Aspen
made use of “unfair, abusive negotiation practices with national authorities and/or hindered parallel trade between the Member States.” Several national competition authorities are engaged in similar probes. In the UK, for example, the CMA has embarked on several investigations, including the examination of alleged excessive and unfair prices with respect to hydrocortisone tablets under the relevant competition law provisions. Coincidentally, the EU’s Court of Justice is expected to rule on 14 September (on a reference from Latvia’s Supreme Court) in a case which may provide important guidance on when a price is “abusively excessive” in EU competition law.

EU

Google’s €2.42 billion abuse of dominance fine

In June 2017, the European Commission ended a seven-year long probe into Google’s business practices related to online comparison shopping services. The ubiquitous search engine received an unprecedented fine of €2.42 billion for abusing its market dominance. The Commission’s finding of abuse centred on Google systematically favouring its own comparison shopping service, and demoting rival comparison shopping services, in the presentation of search results. Google’s shares of internet search persistently exceed 90% across Europe.

The Commission has emphasised that, whilst preserving the need for a case-specific analysis of each market, the decision constitutes a “precedent” providing “the framework for the assessment of the legality of this type of conduct.”

Although this decision concludes one long investigation, it is only the first in a series of Commission investigations into the company’s business practices (abuse of dominance proceedings have been brought in two further cases, concerning the Android operating system and AdSense). Decisions on both cases are expected in the coming months.

The development is also reflective, more generally, of abuse of dominance being high on the enforcement agenda in the tech sector, mirroring the attention this has received elsewhere. For example, there are predatory pricing and exclusivity payments investigations against Qualcomm. And, in the pending appeal against the €1.06 billion fine on Intel, the EU’s Court of Justice is expected to hand down its final ruling on 6 September.

Facebook’s €110 million merger control fine

Under the EU Merger Regulation, the European Commission can impose fines of up to 1% of the aggregate turnover of companies that intentionally or negligently provide incorrect or misleading information. In May 2017, the Commission fined Facebook €110 million.

In particular, the Commission found that Facebook, when it notified the WhatsApp acquisition in 2014, provided incorrect or misleading information, by informing the Commission, on two separate occasions (in the notification form and in a reply to a request of information), that it would be unable to establish reliable automated matching between Facebook users’ accounts and WhatsApp users’ accounts, whilst the technical possibility of automatically matching Facebook and WhatsApp users’ identities already existed.

The decision, with the highest ever fine imposed for a procedural breach in a merger case, highlights the Commission’s preparedness to scrutinise and safeguard the integrity of the merger review process - for notifying parties, faced with the onerous burden of the provision of necessary documents, the decision is an exacting reminder to take care
not to “intentionally or negligently” provide incorrect or misleading information, particularly when submitting statements about merging parties’ future behavior.

A bevy of e-Commerce inquiries

In May 2017, the European Commission published the Final Report on its e-Commerce sector inquiry. The two-year inquiry complemented legislative proposals on geo-blocking and received input from a multitude of online businesses. In addition to providing an opportunity for the Commission to consider commercial practices in this space, the inquiry has also resulted in the launch of several investigations.

Indeed, in June 2017, the Commission opened formal investigations into the distribution agreements and practices of clothing manufacturer and retailer Guess, as well as into Nike’s, Sanrio’s and Universal Studios’ licensing and distribution practices. These probes follow on from separate investigations launched by the Commission earlier in the year to assess if certain online sales practices prevent consumers from enjoying cross-border choice and being able to buy consumer electronics, video games and hotel accommodation at competitive prices.

Online practices have also received attention in judicial proceedings, with an advisory Opinion issued in July by Advocate General Wahl in the Coty case pending before the EU Court of Justice (see our client alert here). The key issue in this case concerns the application of competition law to selective distribution systems prohibiting sales of luxury goods on the online market. A final ruling is expected in the coming months.

In addition to being under the Commission’s spotlight, the e-Commerce sector is increasingly being scrutinised by the national competition authorities of EU Member States. These developments suggest that antitrust enforcement, throughout the EU, remains keenly focused on conduct that has emerged as a result of the growth of e-Commerce and underscores the importance of reviewing online business practices to ensure their compliance.

US

Make Antitrust Great Again

On the campaign trail, President Trump argued that “big is bad” and expressed concern for several high-profile mergers and criticized the market dominance of certain technology firms. Speculation followed on what a Trump presidency would mean practically for antitrust enforcement. More than seven months into his presidency, however, several top positions remain vacant at the DOJ and the FTC, resulting in part from gridlock in Washington, but also calling into question the Trump administration’s commitment to vigorous antitrust enforcement.

Confirmation for Trump’s nominee to head the Antitrust Division at the DOJ is further delayed after Democratic Senator Elizabeth Warren placed a hold on the nomination. She had previously expressed concerns about the nominee’s status as a former lobbyist. As a result, a final vote will not take place until September at the earliest. At the FTC, three of the five commissioner positions are vacant, and no permanent chairperson has been appointed, although former Bureau of Competition director Joseph Simons is rumored to be on the shortlist.

The authorities are likely to continue to make criminal prosecutions a priority, focusing on individual conduct in the US and abroad. On the mergers front, “big is bad” is not an anticipated enforcement policy, but it remains unclear what role politics and job creation will play in merger enforcement. It may be that the agencies will be less aggressive on the
scope of merger remedies, but a strict focus on the financial commitment of potential buyers will likely continue. Monopolization and other civil non-merger enforcement will be less of a priority (with some notable exceptions), and we are less likely to see more creative remedies such as disgorgement used.

Meanwhile, in an effort to redefine its legislative priorities, the Democratic Party announced a “better deal” for the American public, which includes increased merger control enforcement and even breaking up large companies if they hurt consumers. This agenda is unlikely to result in legislation in the current Congress.

**Defeated, disputed and drawn out deals**

Despite short-staffing, the agencies have had a busy summer successfully blocking deals. Online fantasy sports brokers DraftKings and FanDuel abandoned their proposed merger following the FTC’s complaint filed in a federal district court to block the transaction. The FTC claimed that the combined entity would control more than 90% of the market for paid daily fantasy sports contests and result in increased prices and decreased innovation.

Pharmaceutical retail chain Walgreens abandoned its $9.4 billion acquisition of Rite Aid following concerns from the FTC that the offered divestitures fell short. Walgreens has announced that it now intends to acquire half of Rite Aid’s stores in the US for $5.2 billion subject to FTC approval.

After a 10-day trial, the DOJ successfully blocked EnergySolutions’ $367 million acquisition of Waste Control Specialists. The court ruled that the combination of the two most significant competitors for the disposal of low-level radioactive waste available to commercial customers would result in higher prices, noting high barriers to entry into the market.

Each of these challenges was a carry-over from the prior administration. Meanwhile, a handful of large deals remain pending, so far with no apparent shift in enforcement policy. Staff at the DOJ continue investigations into AT&T’s $84 billion bid for Time Warner and the proposed $66 billion merger of Bayer AG and Monsanto Co., while the nominee to head the Antitrust Division at the DOJ awaits Senate confirmation.

**DOJ continues focus on people**

The DOJ has demonstrated that it will continue to pursue non-US nationals for anticompetitive behavior taking place outside the US. Three UK nationals and former traders at major banks accused of manipulating the foreign currency exchange spot market surrendered to the FBI and were arraigned on charges of conspiracy to fix prices and rig bids. They will face trial as early as next summer.

In a separate investigation, three shipping executives and nationals of Sweden, Norway and Germany were indicted and charged with participating in a global conspiracy to allocate customers and routes, rig bids and fix prices for the sale of international ocean cargo shipments to and from the US and elsewhere. The latest chapters in the DOJ’s global cartel investigations serve as a reminder of the DOJ’s focus and ability to prosecute foreign nationals for cartels that affect US commerce.

**China**

**Healthcare remains in enforcers’ crosshairs**
The healthcare sector continues to be targeted by the National Development and Reform Commission (NDRC) for enforcement and legislative initiatives in recent months.

The NDRC in the past years has launched several rounds of market investigations, and even imposed hefty sanctions on a number of multinational and Chinese companies active in pharmaceuticals and medical devices. In July, the NDRC imposed total fines of RMB 443,900 (approximately $67,000) on two Chinese drug makers for abuse of market dominance by selling isonicotinic acid hydrazide ingredients at unreasonably high prices and for an unreasonable refusal to deal. The agency found that the two companies have a “collective dominance,” a theory which has only been applied rarely in its enforcement to date.

Pharmaceutical and medical device companies doing business in and with China should bear in mind that the healthcare sector is on the NDRC’s radar and are advised to frequently review their compliance in the constantly intensive enforcement environment.

Hong Kong

Strong enforcement momentum

The Hong Kong Competition Commission, now in its second year of enforcement, had a busy summer. The regulator published its first Block Exemption Order, granting shipping liners a limited exemption covering vessel sharing agreements, but it refused to exempt vessel discussion agreements. The move was criticised by the shipping industry and is seen as a sign that the Competition Commission will not accept claims of economic efficiencies without solid economic evidence that agreements and conducts benefit customers. The Competition Commission has also shown that it can navigate tricky waters and ignore political pressure on thorny topics.

In August, the Competition Commission launched its second action before the newly created Competition Tribunal. The case concerns construction companies that are accused of sharing the market for flat decoration in several newly built estates. The case, for which there is no clear timetable, confirms that the regulator will prioritise the fight against cartels, and sectors which affect the people of Hong Kong directly.

India

Business-friendly merger review reforms

Many would agree that with jurisdictional rules of merger control the devil is in the detail. India’s rules are no exception, but a series of technical – but important – changes were introduced in June 2017. Most notably, a merger, amalgamation or acquisition is now exempt from merger notification in India, provided that the target does not have:

(i) assets in India exceeding INR 3.5 billion (approx. USD 55 million); OR

(ii) turnover in India exceeding INR 10 billion (approx. USD 156 million).

In addition, it has been clarified that, for asset acquisitions, the value and turnover attributable to the target business alone, i.e., the asset being acquired and not the seller group, should be considered when determining the applicability of this exemption. This change gives the exemption real effect.
The government has also removed the mandatory deadline to notify transactions to the CCI within 30 calendar days of signing of a binding agreement.

These changes have been welcomed by the business community as they increase the ease of doing business in India.

**Fines should be based on sales of affected products/services only**

The Supreme Court of India has held that penalties under the Competition Act 2002 should be calculated by reference to relevant turnover only, i.e., the turnover relating only to those products/services which are the subject matter of the infringement, as opposed to the total turnover of the infringing party. The Supreme Court held that this would be in accordance with the principle of proportionality and the purpose and intent of the Act.

**Amendments to leniency policy**

The CCI has updated its leniency programme with a view to boosting leniency applications by allowing up to four companies to benefit from penalty reductions and by extending penalty reductions to the individuals in charge of an enterprise at the time of its participation in a cartel. The fine reductions are now assured for all applicants: the first applicant may be granted up to 100% reduction in penalty and the second applicant up to 50%, while the third applicant or any subsequent applicants may be granted up to 30% reduction in penalty.

These changes follow the CCI’s decision to grant leniency for the first time in January. Although the investigation had already started, the CCI granted a 75% reduction in penalties to the first leniency applicant and to the director involved in the cartel. The CCI’s decision indicates the consideration given to additional value brought by an applicant even after an investigation had already been initiated by the CCI.

**Australia**

**Coming soon: competition law reform**

The government’s proposed reforms to Australia’s competition laws have been introduced into parliament and will likely be passed into law in the coming months. The reforms are the most significant changes to competition law in Australia for the past two decades. A key reform is the amendment of Australia’s Misuse of Market Power prohibition, expanding the scope of the provision so that it will prohibit any misuse of market power with the purpose or effect of substantially lessening competition. Australia’s anticompetitive conduct provisions are also set to be amended, with the proposed introduction of a prohibition against ‘concerted practices’ that have the purpose or effect of substantially lessening competition. The government intends to use European jurisprudence on ‘concerted practices’ as guidance for the regulator (the ACCC) and the courts.

**First criminal cartel charge**

Also, for the first time in Australia, a company has been charged and fined under the criminal cartel conduct provisions which were introduced in 2009. Global shipping company Nippon Yusen Kabushiki Kaisha (NYK) was ordered to pay a fine of AU$25 million (approximately US$20 million) on 3 August after pleading guilty to allegations of criminal cartel conduct. The alleged conduct occurred in
connection with the transportation of imported vehicles into Australia between July 2009 and September 2012 and involved claims of bid rigging, price-fixing and customer allocation. NYK has also faced charges in other jurisdictions, including the US. In determining the fine, the court took into account the general severity of cartel conduct and the desirability of ensuring deterrence in the first criminal cartel conduct case. However, the fine of AU$25 million incorporated a significant discount of 50% for NYK’s early guilty plea, level of contrition, present cooperation and assurances of future assistance with related investigations. NYK’s future cooperation specifically accounted for 10% (AU$5 million / approximately US$4 million) of the discount.

South Africa

Far-reaching reforms

In May 2017, the South African Minister of Economic Development announced that proposed changes to the Competition Act are being finalised that will have far-reaching consequences on South African competition enforcement. The Minister indicated that the proposed changes will address “high levels of economic concentration and racially-skewed ownership profiles.” A related statement explains that the proposed amendments will not only strengthen enforcement against anticompetitive conduct, but will also require the consideration of the concentration, ownership profiles and structural impediments to entry or expansion in markets assessed by the competition authorities in assessments of potential anticompetitive conduct and in mergers. In addition, the proposed amendments will seek to incentivise firms to adopt strategies that would alter market structures, reduce concentrations and barriers to entry, and expand ownership. Much more information will be needed to shed light on the exact scope of these important proposed amendments.

These amendments, coupled with reforms in Kenya, Zimbabwe, Namibia, Swaziland and Tanzania, have potentially significant implications for businesses with a presence in Africa. It is evident that as competition law continues to evolve rapidly throughout the continent, developments in this area of the law will need to be carefully monitored.

Brazil

Two consecutive mergers blocked

According to CADE’s statistics, almost 2,000 merger filings were assessed since the “new” pre-merger notification was introduced in 2012. Around 30 cases were cleared with remedies, and four blocked outright – two of these were blocked this summer: Kroton/Estácio de Sá in the private education market and Ipiranga/Alesat, a merger between two fuel distribution chains.

Both Kroton/Estacio and Ipiranga/Alesat went through lengthy, tough and ultimately unsuccessful remedy negotiations before the blocking decisions were rendered. Although these cases are evidence of the Brazilian authority’s strict approach, both markets had already been targets of antitrust intervention in the past: private education as a result of recent consolidation in the sector (divestments had already been imposed in previous cases) and fuel distribution owing to a long history of coordination and cartel convictions.
First investigation of a non-reportable transaction

In June 2017, CADE finally approved Guerbet’s global acquisition of the contrast media business from Mallinckrodt. The deal had closed in 2015, but following a complaint by competitor GE Healthcare, CADE conducted a ten-month assessment, finally clearing the deal unconditionally, notwithstanding market shares above 60% in some segments. This marked the first-time CADE had exercised its power to review non-reportable transactions within one year of implementation.

The latest investigations in “Operation Car Wash”

CADE has launched three new bid-rigging probes in 2017, following on from earlier investigations that developed out of the Petrobras corruption scandal. Investigations under the so-called, “Operation Car Wash” have been extended to the energy sector (nuclear and hydroelectric power plants), transportation (railways) and different civil construction projects, including urbanisation, large-scale buildings and soccer stadiums.

The number of leniency applications and settlement agreements, in particular as a result of Operation Car Wash, made CADE simplify the negotiation process of settlement agreements, adopting a sort of fast track approach in some cases. It also seems to be affecting the investigation of unilateral anticompetitive practices, which appear to be a secondary priority for CADE at the moment, due to the stretched workforce focusing on complex mergers and cartels. Irrespective of the above, according to Diogo Thomson de Andrade, interim General Superintendent, his priorities for the second term of 2017 are to move forward with preliminary inquiries involving Operation Car Wash and to issue opinions on most conduct and cartel cases that have been under investigation for five years or more.